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In Re: Rights of Land Owners with Reference to Operators of Aircraft

DOCUMENTS

IN RE: RIGHTS OF LAND OWNERS WITH REFERENCE TO OPERATORS OF AIRCRAFT*

In opinion of January 15, 1930, to the Executive Committee and to the Board of Directors of the National Association of Real Estate Boards we dealt at considerable length with this subject. In this communication (p. 12) we called attention to the case of *Smith* v. *New England Aircraft Co.*, then pending in the Supreme Judicial Court of Massachusetts which involved questions of trespass and nuisance with respect to low flying. Since that communication (January 15) this case has been decided by the Supreme Judicial Court of Massachusetts. An opinion was rendered March 4, 1930, by Rugg, C. J. (While this case has not yet been officially reported, it may be found in "The United States Aviation Magazine" of March 22, 1930.) We wish to direct your attention to some features of this opinion.

In the lower court the case was referred to a Master who made certain findings which seemed to have been approved by both parties and therefore were regarded by the court as tantamount to an agreed statement of fact. The plaintiff was the owner of a country estate known as Lordvale, consisting of about 270 acres located at Grafton. Upon it were a large and substantial house used as a residence, a library, two small houses, a garage and some other small structures. A great deal of money had been expended in improving the premises. Except for a few spaces of lawn and garden, substantially the entire tract is covered with dense brush and woods. It is used as a country estate and not as a farm. The district was devoted largely to agriculture and residence prior to the establishment of an air field in question. An air field consisting of 92 acres was established in 1927 adjoining this estate. The plaintiff's residence was 3,000 feet distant from the nearest point of the flying field. Numerous flights were made over this estate and over the residence. Except in take-offs and landings, the flights were found not to be at low altitudes. In take-offs and landings the flights at low altitudes were over that portion of the premises which was not near the residence or other buildings. In some of the take-offs and landings flights were made over the premises at altitudes as low as 100 feet. With one or two exceptions, no flight at altitudes of less than 500 feet were made directly over the premises in the immediate vicinity of the buildings. The Master also found: "The noise from planes flying over the plaintiffs' land does not materially interfere with their physical comfort." The Master found that no one on the premises had suffered from fear or fright by reason of the flights, that no damage had been occasioned to the premises with respect to noise. The Master said:

> "I find the plaintiffs are persons accustomed to a rather luxurious habit of living, and while the noise from the airplanes in flight over

*Supplementary opinion of the General Counsel for the National Association of Real Estate Boards to the Executive Committee and Board of Directors of the National Association, delivered March 31, 1930.

> their premises has caused them irritation and annoyance, yet gauged by the standards of ordinary people this noise is not of sufficient frequency, duration or intensity to constitute a nuisance."

The court states that the case has been presented solely on the ground of trespass and nuisance resulting from its continuance. Plaintiffs' main proposition was

> "The air space which is now used or may in the future be used in the development of the underlying land is the private property of the land owner, in which he is entitled to the exclusive use and control."

The plaintiffs also contended:

> "This right to usable air space is a vested right."

The court then alludes to the statutory provisions of Massachusetts and to the Federal provisions found in the "Air Commerce Act of 1926." The court is of the opinion that the Federal act is a proper exercise of Congress in the regulation of interstate commerce. The court further concludes that the statutory provisions of Massachusetts regulating the altitude at which flight may take place are valid by reason of being a proper exercise of the police power. The court stated that in the absence of controlling police regulation one may erect a structure on his land as high as he desires and is able. The court states that the Massachusetts legislation does *not* regulate the use of his property by the land owner, but regulates merely the minimum altitude of flight in air navigation. It is then stated that the Massachusetts legislation was manifestly enacted under the police power. Charles P. Hine says in a note to his article, "Home versus Aeroplane," in the April, 1930, "American Bar Association Journal" (p. 218), that the court in this case, in holding that the exercise of the police power or the commerce power justifies legislation conferring rights over another's land, goes beyond all precedent. The court in deciding that the legislative act was a proper exercise of the police power said that its provisions constitute valid regulations of the flight of aircraft *in air space actually unoccupied by the owner of the underlying land.* The court does not discuss the question of light and air, the right of freedom from noise or interference with privacy.

The opinion then cites and discusses a number of cases dealing with statutes which regulate and limit private rights of land owners. It is then said:

> "None of these decisions are precise authorities in support of the view that the regulations found in ST-1922, c534 and its amendments as to flight by aircraft in upper air-spaces, are valid as against the owner of the underlying land. The principles there declared require the conclusion that such flight by aircraft within the limits disclosed on this record is lawful against the protest of the owner of the underlying land. It is to be observed that in the case at bar there has been no harm to the landowners. There have not been flights by excessive numbers of aircraft. The light of the sun has not been obscured and the land has not been shadowed. No airlane of through travel has been established over their land. Nothing has been thrown or fallen from the aircraft upon the underlying ground. There have been no noxious gases or fumes. There has been no other interference with any valuable use of which the land of the plaintiffs is capable."

There is no indication what the decision of the court would have been, had any of these elements been in the case. It would be interesting to know

what would have been the effect on the decision here if there had been involved airlanes of through travel; if there had been flights by excessive numbers of aircraft; if there had been noxious gases or fumes. It would be interesting to know what would be regarded as *excessive numbers* of aircraft. The court concludes that the legislature has not exceeded the right to interfere with the private rights of land owners, in establishing 500 feet as the minimum altitude of flight by aircraft.

The next question which had the attention of the court was flying at altitudes as low as 100 feet. The court calls attention that the statute, in fixing the minimum altitude of flight by aircraft, makes exception in favor of lower but unspecified altitudes in embarking or taking off from or landing on the surface of the earth. The court held that the purpose of this exception was to protect the pilot from charges of violation of law, and not for the purpose of enacting a legislative limitation upon the rights of land owners in the air space.

It is then said that there are cases holding that an invasion of the air space above the land without contact with the surface constitutes trespass. Pollock on Torts is cited for one test. It is here said:

> "It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession."

The court then says that not infrequently buildings in cities reach 300 feet or even more. It states that it is not decisive that the plaintiffs do not at the present make the possible effective possession a realized occupation; that it is an invasion of property rights where there is a possible effective possession, even though there is no actual possession. The court also holds that the facts in the case show intrusion upon the land by flight of aircraft at these low altitudes by noise. Reference is made to a finding of the factor that the noise of aircraft in flight at an altitude of less than 200 feet was less and shorter than that occasioned by the passing of the ordinary motor truck. The inference seems to be that the noise of the ordinary motor truck is not excessive and is endurable. The fact remains, nevertheless, that many people acquire country estates for the purpose of getting away from the noise of motor trucks and kindred noises. This purpose for which country estates are sought will be rendered futile if the character of noise which comes from a motor truck must be endured when it comes from overhead instead of from the surface of the ground. The court takes the position that flying at an altitude of no more than 100 feet is a trespass upon the owner's property. It refused to decide whether any elevation more than 100 feet and less than 500 feet would also be a trespass. It is suggested that airports of sufficient area might be provided so that take-offs and landings could be made without trespass upon the land of others. It is suggested that this might be accomplished by means of the power of eminent domain.

This case is the most comprehensive decision yet rendered with respect to trespass and nuisance as regards low flying and noise. It will have to be studied in the light of other discussions of this subject. Until the decision has been carefully analyzed it cannot be stated whether it is sound, or to what extent it is sound. We are disposed just now to believe that in some respects the decision is not well reasoned and not in accord with the prin-

ciples of law which should prevail with respect to the regulation of aviation and the rights of the land owner.

NATHAN WILLIAM MACCHESNEY,
General Counsel.

FORMS ON RADIO APPEALS*

(1) Suggested Form for Notice of Appeal

In the Court of Appeals of the District of Columbia.
No._____

_____ _____,
Applicant-Appellant.
vs. Radio Commission No._____
The Federal Radio Commission.

Notice of Appeal to the Court of Appeals of the District of Columbia and Reasons Therefor.

Now comes _____ _____, the applicant-appellant in the above-entitled proceeding, and says that he is aggrieved by the decision of the Federal Radio Commission rendered herein against him on _____ _____, 19_____, effective _____, and gives notice of his appeal therefrom to the Court of Appeals of the District of Columbia, assigning in support thereof the following:

Reasons for Appeal

(Here state, in paragraphs numbered consecutively, the reasons relied on for modification or reversal, etc.)

_____ _____, Applicant-Appellant.

(Verification.)

To the Federal Radio Commission,
Washington, D. C.

Please take notice that the foregoing notice of appeal and reasons for appeal will be filed forthwith in the Court of Appeals of the District of Columbia, pursuant to the provisions of the Radio Act of February 23, 1927.

_____ _____, Attorney for Applicant-Appellant.

Date, _____ _____, 19_____.

(Prepare the foregoing in duplicate. File certified copy with the Radio Commission, and then file the original with the Clerk of the Court of Appeals. It is suggested that the copy filed with the Commission may be certified by appending the following thereto:

Personally appeared before me, _____ _____, a Notary Public in and for the District of Columbia, _____ who first being sworn on oath deposes and says that he is the attorney for the applicant-appellant herein, and that the foregoing is a true copy of the notice of appeal and reasons for appeal to be filed forthwith in the Court of Appeals of the District of Columbia.

_____ _____, Notary Public.

The court rule with reference to appeals under the act is as follows:

Rule 32.

"The general rules of this court, regulating the practice thereof, and the requirements as to the printing of records and filing of briefs, shall

*By Moncure Burke, of the District of Columbia Bar, Deputy Clerk, Court of Appeals of District of Columbia, author of *Notes on Practice in the Court of Appeals of the District of Columbia.* (See 2nd ed.) The suggested form for notice of appeal in the text is reprinted from Mr. Burke's book, and the additional suggested forms consist of material which he plans to incorporate in the next edition of the book. The JOURNAL OF AIR LAW is greatly indebted to him for his consent to publish these forms, which proved of great value to lawyers taking appeals under the Radio Act of 1927, and have been generally followed.—*Editorial note.*

apply to appeals under the act for the regulation of radio communications. Such cases will be placed on the special calendar. After the determination of the case, a copy of the opinion and judgment will be certified to the lower tribunal, in lieu of a mandate, in the usual course."

See par. 53 et seq.,[1] for further proceedings in the Court of Appeals with reference to printing the record, filing briefs, etc.

(2) Petition for Stay

In some cases it has appeared that unless the Commission were prohibited from proceeding pending appeal there might not be sufficient left of the subject matter to satisfy appellant's claims in the event of a decision by the Court in his favor. In this character of cases the practice has grown up of applying for a stay order when the notice of appeal is filed or shortly thereafter. Such a petition may be drawn on the following lines:

Court of Appeals of the District of Columbia.
(Title and number of case.)
Petition for Stay Order.

May it please the Court:

Petitioner, ——————————, appellant in the above entitled cause, respectfully shows unto your Honors:

(Give facts showing necessity for stay to protect appellate rights.)

Wherefore, the premises considered, your petitioner, being without other remedy by appeal or otherwise, prays that a stay order pending the determination of this appeal be issued out of this Honorable Court to the Federal Radio Commission—

(1) Prohibiting the said Commission from granting licenses for so many of the available frequencies requested by appellant as to reduce the remaining number of available frequencies below the number sufficient to give effect to the decision of this Court if it should be held that the application should have been granted.

(or, fit prayer, or prayers, to relief desired.)

(Signed by petitioner, or:) ——————————Petitioner.
by ——————————Attorney.

(Verification by petitioner or attorney. Sometimes an affidavit as to the facts is annexed.)

(File three ribbon copies and one carbon—one copy bearing original signatures. Show service on opposing counsel. Fold and indorse each copy.)

(3) Notice of Desire to Adduce Additional Evidence

This must be in the form of a verified petition stating the nature and character of the evidence and be filed within 20 days after the Commission files its statement of facts and grounds for decision. (See Par. 220 hereof for the statute.[2])

A suggested form follows:

Court of Appeals of the District of Columbia.
(Number and title of case.)

Notice of desire to adduce additional evidence, and Petition.

May it please the Court:

Petitioner, ——————————, respectfully notifies this Honorable Court of ——— desire to adduce additional evidence in the above entitled cause under section 16 of the act approved February 23, 1927, for the regulation of radio communications, and for other purposes.

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1. *Notes on Practice*, etc., 2nd ed., pp. 27 et seq.
2. Ibid., p. 104.

The nature and character of the additional evidence is as follows:
(insert)
The reasons for adducing additional evidence are as follows:
(insert)
Wherefore, Petitioner prays leave to adduce additional evidence of the nature and character set forth, in such manner and upon such terms and conditions as the Court may deem proper.

_____Petitioner.
by _____Attorney.

(Verification by attorney.)

(File 3 ribbon copies and one carbon, one bearing original signatures. Fold and indorse each copy. Show service on opposing counsel.)

(4) Designation for Printing

In some of these cases the original papers and testimony are sent to the Court in bulk. Much of this may not be necessary for inclusion in the printed transcript. On receipt of returns from the Commission in this shape the Clerk of the Court usually notifies counsel, suggesting the advisability of designating the necessary papers. Under the rules the appellant has six days to file such designation, which time may be extended on motion. (See Par. 58 for the rule.[3])

Apparently a satisfactory way is for counsel on both sides to go over the papers together, select those necessary then file a joint designation as to the contents of the printed transcript, though of course designation and counter-designation may be filed if preferred.

Where the papers are voluminous six days usually is insufficient for preparation of designation. If extension of time is desired it should be asked for by motion filed within the six days. (File 3 ribbon copies and 1 carbon—one of them bearing original signatures. Fold and indorse each copy. Show service on opposing counsel.)

(5) Petition for Leave to Intervene

In some appeals, where there were outstanding licenses or pending applications that would be affected by a decision of the Court sustaining appellants' contentions, such licensees or applicants have filed petitions for leave to intervene as party appellee in order to appear and protect their interests. Such a petition may be drawn along the following lines

Court of Appeals of the District of Columbia.

(Title and Number of Case.)

Petition to Intervene as Party Appellee.

May it please the Court:

Petitioner, _____, respectfully shows unto your Honors:

(Description of petitioner.)
(Interest of petitioner, etc.)

Wherefore, the premises considered, your petitioner respectfully prays:

1. That this Honorable Court grant to your petitioner the right to intervene in this cause as a party appellee.
2. That in the event petitioner be granted leave to intervene a reasonable time be allowed to file brief.

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3. Ibid., p. 28.

3. For such other relief as the premises may require and to the Court may seem just.

(Signed by petitioner, or:) .....Petitioner.
by .....Attorney.

(Verification by petitioner or attorney.)

(File 3 ribbon copies and one carbon,—one copy bearing original signatures. Show service on opposing counsel. Fold and indorse each copy.)

RADIOTELEGRAM: AUTHENTICITY OF SIGNATURES

OPINION*

(Supreme Court of Justice, Bogota)

April 23, 1929

Petition by the Solicitor to revoke the order of the 9th instant, by which Doctors Alberto Goenaga and Camilo Bernal L., were recognized as attorneys-in-fact of the Compañia Colombiana de Petroleo, by virtue of substitution made by Mr. Clarence S. T. Folsom, according to radiotelegraphic dispatch of the Consul-General of Colombia in New York, transmitted by the Minister for Foreign Affairs.

The Solicitor urges three reasons in support of his petition. The first one is that the memorial of substitution has not been presented conformably with what is provided in Article 41 of Law 104 of 1922. But this provision is applicable only when the powers have been granted in this country. Those granted in foreign countries are governed by the terms of Article 13 of Law 124 of 1890, which reads as follows:

> "The powers, minutes of the civil registry and other documents issued in foreign countries, and which interested parties may present to the Courts of First Instance and Tribunals in order to establish their rights, shall be valid if they are authenticated as required by the Colombian laws. When so authenticated, it will be presumed that they are granted conformably with the local law of origin, unless an interested party shall show the contrary."

According to this article, in order that a power or other document issued outside of Colombia be valid within the territory of the Republic, it is sufficient if it be authenticated as required by the Colombian legislation. What are these authentications? Article 4 of the Treaty concerning Procedural Law of the South American Congress of Montevideo, to which Colombia has adhered by Law 68 of 1920, provides as follows:

> "The legalization is considered as in due form when in conformity with the laws of the country whence the document issues, and is authenticated by the Diplomatic or Consular Agent which the Government of the State in whose territory it is to be executed shall have in said country or place."

Reconciling this provision with that of Article 13 of Law 124 above cited, we find that all that is necessary in order to produce the effects contemplated in the latter provision is that the power or document in question shall have been authenticated by the Colombian Diplomatic or Consular Agent in the country whence the document proceeds. And as this requisite

*Translated by Prof. Julius I. Puente, Northwestern University School of Law, from the Gaceta Judicial, Colombia, Vol. 35, No. 1802.

appears to have been complied with in respect to the power here involved, there can be no doubt that the same is legally valid, and will be presumed to have been granted conformably with American law, which is the law applicable to the case, in keeping with Article 21 of the Civil Code.

The second reason urged by the Solicitor is that the signature of the Colombian Consul in New York has not been authenticated by the Ministry for Foreign Affairs. This requirement, even when customary in practice, is not indispensable in order that the respective document should produce its legal effect, neither would it be possible to comply with it in the case of cable or radiotelegraphic dispatches. As to the rest, the fact that the dispatch mentioned was sent through the Minister for Foreign Affairs and that it was communicated to the Court by that high official with the attestation that the dispatch comes from the Consulate General of Colombia in New York, doubtless constitutes a guaranty of authenticity, as it shows that the dispatch in question has come to the Ministry in the form customary for dispatches of this nature.

The last point made by the Solicitor to the effect that the radiotelegram mentioned is not authenticated, is groundless, since the signature of the receiving operator appears in the upper portion of the dispatch, as a guaranty of authenticity.

For the foregoing reasons, the revocation requested is denied.

Notify and publish in the Judicial Gazette.

March 16, 1929.

J. LUZARDO FORTOUL.